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No. 99-___

IN THE
SUPREME COURT OF THE UNITED STATES

DENISE HERNDON,

Petitioner,

vs.

SUNSERVICE, a division of Sun Microsystems, Inc.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Ninth Circuit's requirement that a Title VII plaintiff must offer "specific and substantial" evidence to demonstrate pretext is consistent with Rule 56, FRCP, which merely empowers trial judges to examine the record to decide if a genuine issue of material fact exists for trial.

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SUNSERVICE, a division of Sun Microsystems, Inc.,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this action on June 18, 1999.

OPINIONS BELOW

The Memorandum Opinion of the Court of Appeals for the Ninth Circuit, the Order Granting Defendant's Motion for Summary Judgment, and the Judgment of the District Court for the Northern District of California, in this action, have not yet been reported. They are set forth in the Appendix, *infra*.

JURISDICTION OF THE COURT

The judgment of the Court of Appeals for the Ninth Circuit, herein sought to be reviewed, was entered on June 18, 1999. Jurisdiction of this Court to grant the writ is conferred by 28 United States Code, §1254.

STATUTE INVOLVED

This case involves Title VII of the Civil Rights Act of 1964, ***as amended***, which provides in pertinent part:

> It shall be an unlawful employment practice for an employer-
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin. 42 United States Code §2000e-2(a).
>
> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management

committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter. 42 United States Code §2000e-3(a).

STATEMENT OF THE CASE

Petitioner is DENISE HERNDON, an African American, female adult citizen of the United States, residing in Modesto, California.

On August 14, 1995, Petitioner filed an employment discrimination complaint, alleging violations of Title VII with respect to Respondent's failure to relevel her position, failure to promote her, and respondent's retaliation against her for opposing unlawful employment practices and for participating in protected proceedings, while she was employed by Respondent as a Marketing Coordinator.

On December 4, 1997, Respondent moved for summary judgment or, in the alternative, for partial summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure (FRCP).

On April 8, 1998, the District Court filed it order granting Respondent's motion for summary judgment on the grounds that Petitioner had failed to prove Respondent's explanations of its conduct were pretextual. (Appendix B, ***infra***, 10a-31a). Judgment was entered in conformity with the order granting summary judgment on April 8, 1998. (Appendix C, ***infra***, 32a).

Petitioner timely appealed the order and judgment granting summary judgment to the Court of Appeals for the Ninth Circuit. On May 27, 1999, the Court of Appeals affirmed the judgment. (Appendix A, ***infra***, 1a-9a).

Petitioner filed a timely petition for rehearing. On June 18, 1999, the Court of Appeals denied the petition for rehearing. (Appendix D, ***infra***, 33a).

STATEMENT OF FACTS

A. PETITIONER'S BACKGROUND, JOB DUTIES, AND PERFORMANCE HISTORY

Denise Herndon ("Herndon") is an African-American female. On June 9, 1986, Herndon began her employment with Sun. She worked as an Installation Coordinator from June 9, 1986 through March 1, 1988. On March 1, 1988, Herndon's job was releveled from E-3 to E-5 and she took on the title of Senior Database Administrator.

Herndon's job performance while an Instillation Coordinator and Senior Database Administrator was evaluated six times, between September 1, 1986 and September 15, 1989. During that six-year period, her job performance was consistently rated as "Usually Exceeds Job Requirements."

During the same time period, Herndon's communications skills repeatedly received high marks. [1]

B. Herndon's First Involvement in Protected Activity

In April of 1990, Herndon was promoted to a Marketing Analyst, an E-6 position. Herndon's manager, Eileen Marshall, told her that the Marketing Analyst position was really a two-person job. Marshall also told Herndon that Director of Marketing, Jay Friedman, was prejudiced against African-Americans. She advised Herndon to put her name on the redeployment list in order to force Friedman to find her a job in the company. Friedman was the director of the organization in which Herndon and Marshall worked.

Following Marshall's comments, that Friedman was prejudiced against African-Americans, Herndon made an appointment with him to discuss them. When Herndon informed Friedman about Marshall's comments about his dislike for African Americans, he did not deny them.

In September of 1991, following Herndon's discussion with Friedman, she received her first negative performance evaluation. In addition to other negative categorical evaluations, the September 1991 evaluation negatively evaluated Herndon's communication skills. [2] Herndon's

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[1] For example, on March 1, 1988, her supervisor make this note about her communications skills. "Denise has developed an excellent open line of communications with her manager and co-workers. She is well respected and always communicates in a professional and business like manner with her co-workers. She has an excellent grasp of electronic mail which she uses extensively in the performance of her job."

[2] Regarding communication, Herndon's September 1991 evaluation states "Denise can be very persuasive when she needs the cooperation of

September 1991 performance evaluation was written by Marshall and signed by Friedman. At the time Herndon received her September 1991 evaluation, Jay Pederson replaced Marshall and became Herndon's manager.

Marshall and Friedman attached a performance improvement plan (PIP) to Herndon's September 1991 performance evaluation. They releveled Herndon's position from an E-06 Marketing Analyst to an E-04 Marketing Services Coordinator. Herndon disputed her September 1991 performance evaluation and discussed it with Marshall, Friedman, Bill Cote, and Jay Pederson. [3]

On September 9, 1991, in response to her negative performance evaluation, Herndon submitted a rebuttal to her immediate supervisor. She also provided a copy of it to the Human Resources Department and Human Resources Manager, Cheryl Wayne. Herndon disputed her September 1991 performance evaluation. She argued that the performance evaluation was discriminatory and in retaliation for her discussion with Friedman about his alleged prejudice against African Americans. Herndon requested Human Resources to scrutinize the accuracy of the September 1991 evaluation in light of the positive feedback she had repeatedly received previous to the September 1991 evaluation.

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others. But she often assumes a defensive posture when she is challenged. Even though she attempts to 'mend fences,' her attitude sometimes causes interruption in workflow. More consistency in her interactions with others will enhance her effectiveness as a team player."

[3] At the time Herndon received her September 1991 evaluation, Jay Pederson took over as Herndon's manager.

On February 3, 1992, Herndon received her first performance evaluation from Jay Pederson, which was the first performance evaluation she received since September 1991. Both Herndon's overall job performance and communication skills were found to be fully competent and consistently meeting the requirements of her position.

On or about April 1, 1992, Odette Rickert became head of the Marketing Support Group and Herndon's Supervisor. Herndon received performance evaluations from Odette Rickert on August 5, 1992, and July 13, 1993. Again, Herndon's overall job performance and communication skills were found to be fully competent and consistently meeting the requirements of her position.

C. Jay Friedman Reemerged in 1993 to Cause Herndon to Suffer Adverse Employment Actions.

In the summer/early fall of 1993, Rickert told her manager, Jay Friedman, that she needed "someone to relieve [her] workload by taking over certain of [her] duties." Friedman alerted Rickert to the availability of Cathleen Morgan-Marino ("Marino") to relieve her. Marino was an E-05 employee. She was in the process of being laid off.

During a meeting between Friedman and Marino, he suggested to Marino that she speak with Cindy Williams, Jim Schott, and Odette Rickert regarding possible positions. Following her meeting with Friedman, and his meeting with Rickert, Marino interviewed with Rickert. On or about September 6, 1993, Marino transferred into Friedman's group. She assumed several of Rickert's duties. Marino was promoted to E-06.

On November 2, 1993, Rickert, in response to concerns stated by Cristina Atilano ("Atilano") and Herndon about Marino's transfer, requested Sun to reevaluate Herndon's position. Atilano, a Hispanic female, confronted Rickert about the Marino transfer. She saw an opportunity to be promoted herself if Herndon moved up.

Rickert provided Norma Olmos ("Olmos"), a member of Human Resources, a job description of Herndon's duties which Olmos forwarded to John Hytinnen ("Hytinnen"). On January 10, 1994, Hytinnen reviewed Herndon's job description which he was provided. He concluded that Herndon's job did not warrant a higher grade than E-4. As a result, Herndon was not releveled.

D. Herndon Filed a Complaint with the EEOC.

On April 29, 1994, Herndon filed a complaint with the EEOC. Herndon's EEOC complaint alleges that Sun discriminatorily denied her promotions due to her race and retaliated against her for protesting her 1991 performance evaluation. In May 1994, Marian Davis ("Davis"), Human Resources Manager, was notified of Herndon's EEOC complaint.

E. In August 1994, There Was No Problem with Herndon's Communication Skills.

On August 23, 1994, Herndon received a performance evaluation by Tom Berghoff ("Berghoff") and Rickert. Regarding Herndon's overall job performance, the performance evaluation states: "Your performance is consistently superior and you add unique value to the organization. You demonstrate excellence and highly exceptional ability." Her

communications skills were found to be fully competent and consistently meeting the requirements of her position.

F. Herndon Was Blocked from Being Considered for Promotion.

Herndon was approached by Terry Bond ("Bond") about a job opening in the education department as a Project (Engineering) Coordinator 2. On October 19, 1994, she submitted her application, but she was not allowed to interview for the job. The position was awarded to a white male.

G. Herndon Filed a Complaint with the OFCCP and Suffered Additional Adverse Job Actions.

On November 1, 1994, Herndon filed a discrimination complaint with the Office of Federal Contract Compliance Programs (OFCCP). OFCCP notified Sun of the complaint on March 31, 1995. Herndon's immediate management staff was notified of her complaint on April 13, 1995.

On or about January 23, 1995, Valerie Hirsch ("Hirsch") was hired as Rickert's replacement and became Herndon's supervisor. Hirsch reported to Berghoff, who remained the group's second-level manager.

In July of 1995, Herndon became aware of a Marketing Specialist position. On July 17, 1995, she tried to apply for the Marketing Specialist position. Herndon E-mailed her supervisor, Berghoff, and indicated her interest in the position. Berghoff informed Herndon that the position required additional skills which were not in the original posting included with the job description.

On August 29, 1995, Herndon received a performance evaluation from Berghoff and Valerie Hirsch. The overall performance evaluation was negative.

On December 15, 1995, Herndon left Sun due to severe emotional and physical distress. Since December 21, 1995, Herndon has been under the care of a Clinical Psychologist in San Francisco.

HOW SUN DISCRIMINATED AGAINST HERNDON

A. Sun Discriminated And Retaliated Against Herndon.

Sun would not allow Herndon to interview in 1993 for an E-06 position. Prior to Marshall, Pederson, and Friedman re-leveling Herndon to an E-04 position, she was an E-06 employee. Despite her performance record prior to her September 1991 evaluation, and the circumstances surrounding her September 1991 evaluation, Herndon was never considered for an E-06 position, which came into existence in the fall of 1993.

Friedman to whom Herndon had complained about discriminatory promotion policies suggested Marino for the position. The E-06 position was never posted. Rickert stated that she did not think Herndon wanted to do documentation work. Rickert did not ask Herndon if she wanted to do documentation work. Marino is a white female.

On or about February or March 1995, Atilano was asked by Hirsch to train Marino on the BasePrice database, even though it was Marino's responsibility to train new users. Herndon was

familiar with the BasePrice program before Marino's position was created.

B. Sun Discriminated And Retaliated Against Herndon By Not Allowing Her to Interview for a 1994 Project (Engineering) Coordinator 2 Position.

Despite being approached in October of 1994, by Bond and told of a job opening in the education department, Herndon was not allowed to interview for the job. Bond informed Herndon that the education department preferred another person for the job. Sun gave that job to a white male.

C. Sun Discriminated And Retaliated Against Herndon By Not Releveling Her Position.

On January 10, 1994, Hytinnen after reviewing a description of Herndon's duties, which Ms. Olmos supplied him, concluded that Herndon's job did not warrant a higher grade than E-4.

In an eMail from Hytinnen to Ms. Olmos, regarding the reevaluation of Herndon's position, Hytinnen stated that, "the profile of the position does not give me a clear picture of the job. Was this written by the employee or manager? Based on that info, I still do not see a justification for a grade increase. I understand the primary role to be a) run error reports b) provide information to others." Sun promoted or releveled the positions of all of the Coordinators in Herndon's department by 1994, except Herndon.

D. Sun Discriminated And Retaliated Againt Herndon By Discouraging Her From Applying For A Marketing Specialist Position and Giving her a Negative Performance Evaluation in 1995.

On August 23, 1994, Herndon received a favorable performance review. In late 1994, Irene Fischer was advised by her manager, Randie Shapiro, to stay away from Herndon because "Denise is not looked upon very highly." In June of 1995, Berghoff participated in OFCCP Compliance Officer Peggy Martinez's investigation of Herndon's complaints.

From April 1994 to January 1995, Herndon acted as Atilano's supervisor. Herndon trained personnel on the BasePrice program while she worked in the Marketing Department. During the 1994 period Herndon performed many of the tasks that were formerly Ms. Marino's responsibility. While performing Ms. Marino's responsibilities, Herndon put in long hours, often working until 9:00 or 10:00 p.m.

On July 17, 1995, Herndon tried to apply for a Marketing Specialist position. When she expressed her interest in the position to Berghoff, he informed her the position required additional skills. Those skills were not mentioned in the original posting included with the job description. The original, contemporaneous job posting set forth extensive requirements.

In July of 1995, Berghoff called John Lopez, senior product manager with Sun, and questioned him about Herndon. Berghoff told John Lopez that, "I am looking for dirt on Denise" to use to defeat her OFCCP complaint. On August 29, 1995, Herndon received a negative overall job performance evaluation from Berghoff and Valerie Hirsch.

E. Sun Subjected Herndon to Discriminatory Employment Conditions Which Made the Workplace Hostile and Abusive.

The perception that Sun discriminated against its African American employees was widespread. It was well-articulated by a sensing group of white women employees Sun surveyed to obtain a diversity updated on January 28, 1994. According to that sensing group: "White women do not have an even chance with white males, **but African-Americans, Hispanics and Asians, both male and female, have it worse than we do**." (emphasis added).

Racial hostility was encouraged and fostered by top management. In a video tape, Scott McNealy, Sun's CEO, stated that he resented the federal government trying to dictate to him whom he should hire. Mr. McNealy added words to the effect that he would hire "whomever he wanted to" and that "no one was going to tell him whom he can or cannot hire." He was referring to the affirmative action program that Sun was subject to as a federal contractor.

Sun's hostility to African Americans was reflected in the under utilization of African Americans. Sun used intra-company recruitment to fill upper level positions. In its investigation, the OFCCP found that Sun lacked "good faith" in the implementation of its internal recruitment policy, because it "lacked sufficient numbers of qualified minorities internal to the organization to achieve goals." The OFCCP found "substantial disparity" in African Americans employed in higher level positions; that is: Job Groups, 1B, Managers, 2E, Entry Professionals, 2F, Professionals (7+), 2G, Entry Engineers, and 5A, Administrators.

Not only was Herndon a victim of Sun's generalized hostility to African Americans but she was also a victim of specific incidents of racial hostility directed specifically at her. She was treated differently than other employees in the department. Supervisors and co-workers intentionally distant themselves from Herndon.

On August 25, 1995, Berghoff approached Herndon and Atilano and stated to Atilano, while looking at Herndon, that Atilano was to be promoted and then walked away. Hirsch and Berghoff attempted to prevent Atilano from speaking to Herndon.

In addition to Marshall informing Herndon that Friedman was prejudiced against African Americans, Berghoff told Herndon that his friends are white and he hires people like him. Friedman and Berghoff's comments and promotional practices are consistent with the sentiments of Sun's CEO, Scott McNealy.

Similarly, in mid-1993, Sun Director, Alan Hu, in a staff meeting, referred to Dorothy Poole as coming from the "ghetto." When Poole approached Hu to tell him that she found the reference offensive, he replied "you're kidding," and promptly ended the discussion. Paul Rivard, a manager at Sun, commented to Gail Greer, an African-American female, that he preferred the term "master" over "sir."

Racial insensitivity was longstanding at Sun. In 1988, Teresa Montalvo, an African American female, was referred to as "buckwheat" by Angie Adams, a supervisor at Sun. When Montalvo expressed to her manager, Richard Wegman, that the "buckwheat" comment caused her great distress, Wegman

replied "Well, you know what we call black people in Upper State New York: niggers."

The comments of managers and executives which hire and promote within Sun are indicative of the discriminatory culture and hiring policies at Sun as well as the hostile and abusive working conditions Herndon faced. She was the only person in her department not to be releveled. By 1994, every one of the Coordinators, with the exception of Herndon, were promoted: Heeney, a Caucasian female, to E-10; Fischer, a Hispanic female, to E-7; and Foggatio, a Caucasian male, to E-10.

REASONS FOR GRANTING THE WRIT

This Case Presents A Significant Question Of Federal Law Relating to Application of Rule 56, FRCP, In the Context of the *McDonnell Douglas* Order of Proof Formula in Employment Discrimination Cases at the Stage at Which the Title VII Plaintiff Must Demonstrate Existence of a Genuine Issue of Material Fact on the Issue of Pretext.

This Court should grant review in order to resolve a substantial, recurrent question it has not previously decided. This Court has never decided the proper application of Rule 56 in employment discrimination cases. In such cases, to avoid summary judgment, the employee must demonstrate the existence of a genuine triable issue of material fact that the employer's explanation of its treatment of the employee is pretextual or discriminatory.

This Court is yet to address application of Rule 56 in the context of the order of proof formula it first developed in employment discrimination cases in ***McDonnell Douglas***

Corp. v. Green, 411 U.S. 792 (1971). The order of proof formula was subsequently refined in ***Furnco Const. Corp. v. Waters***, 438 U.S. 567 (1978); ***International Brotherhood of Teamsters v. United States***, 431 U.S. 324 (1977); ***Texas Dept. of Community Affairs v. Burdine***, 450 U.S. 248 (1981); and ***St. Mary's Honor Center v. Hicks***, 509 U.S. 502 (1993). These cases came before the Court after a full trial in the District Court. In each case, the Court reinforced the the high value the Nation places upon eradicating employment discrimination by affirming the core principle that the employment discrimination plaintiff must be allowed "a fair opportunity to demonstrate" that the employer's explanation is "a pretext or discriminatory in its application." ***McDonnell Douglas Corp. v. Green***, ***supra***, at 807.

McKennon v. Nashville Banner Publ. Co., 513 U.S. 352 (1995), is the only employment discrimination case to be reviewed in this Court which was disposed of in the District Court on motion for summary judgment. However, application of Rule 56 was not discussed.

Over the past 30 years his Court has decided several cases which discuss application of Rule 56, ***Adickes v. Kress & Co.***, 398 U.S. 144 (1970); ***Anderson v. Liberty Lobby, Inc.***, 477 U.S. 242 (1986); ***Matshushita Electric Industries Co. v. Zenith Radio Corp.***, 475 U.S. 574; ***Celotex Corporation v. Catrett***, 477 U.S. 317 (1986). These cases either deal with product liability claims (***Celotex***); defamation and the standard of proof (***Anderson***); race motivated conspiracy (***Adickes***); and anti-trust (***Matshushita***). ***Celotex*** and ***Anderson*** are invariably cited to set forth the standards applicable to determination of a motion for summary judgment, without courts acknowledging that one case involved a products liability claim and the other defamation in which the plaintiff was required to prove malice

by clear and convincing evidence. See, for example, Appendix B, ***infra***, at 19a.

In this Court's last Term, in ***Hunt v. Cromartie***, 526 U.S. ___, 99 C.D.O.S. 3567 (1999), this Court discussed the application of Rule 56 in a Congressional redistricting case, which involved a claim of unconstitutional racial gerrymander in violation of the Equal Protection Clause of the Fourteenth Amendment. Apropos to the Rule 56 issue in this case, the Court noted:

> Outright admissions of impermissible racial motivation are infrequent and plaintiffs often must rely upon other evidence. Summary judgment in favor of the party with the burden of persuasion, however, is inappropriate when the evidence is susceptible of different interpretations or inferences by the trier of fact. [footnote omitted]. That is not to say that summary judgment in a plaintiff's favor will never be appropriate in a racial gerrymandering case sought to be proved exclusively by circumstantial evidence.

Hunt v. Cromartie, ***supra***, 99 C.D.O.S. 3567, at 3569.

Left without guidance from this Court, the Ninth Circuit has developed summary judgment guidelines which have the effect of converting the summary judgment process into bench trials on the merits. See, ***Godwin v. Hunt Wesson, Inc.***, 150 F.3d 1217, at 1222, (9th Cir.1998). At the summary judgment stage, where the Title VII plaintiff relies upon circumstantial evidence to prove pretext, the Ninth Circuit requires the employee to offer " 'specific' and substantial' [evidence] in order to create a triable issue with respect to whether the

employer intended to discriminate ..." ***Godwin v. Hunt Wesson, Inc.***, supra, at 1222.

The Ninth Circuit misdirects the focus of the inquiry. On summary judgment, the function of the District Court is to inquire and decide if a genuine issue of material fact exists for trial. Rule 56 does not empower District Courts to decide if the plaintiff's evidence is "substantial." A District Court may only decide the sufficiency of the plaintiff's evidence to allow the case to be decided by the trier-of-fact after the case "has been fully heard on an issue" pursuant to Rule 50(a), jury trials, and Rule 52(c), bench or court trials.

The Ninth Circuit's rule arguably imposes a burden upon the Title VII plaintiff to offer direct evidence of discriminatory motive. It requires the Title VII plaintiff to offer "specific" as well as "substantial" evidence. [4] It thereby overlooks the fact that the plaintiff may demonstrate pretext by indirect evidence which casts disbelief upon the employer's explanations. As Justice Scalia stated in ***St. Mary's Honor Center v. Hicks***, ***supra***, at 511:

> The factfinder's disbelief of the reasons put forward by the defendant (**particularly if disbelief is accompanied by a suspicion of mendacity**) may, together with the elements of the prima facia case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons, will permit the

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[4] Indeed, Rule 56(e) requires the nonmoving party to "set forth specific facts showing that there is a genuine issue of material for trial." However, it does not require the nonmoving party to produce direct evidence.

trier of fact to infer the ultimate fact of intentional discrimination.

There is also a conflict within the Ninth Circuit. Earlier in ***Wallis v. J.R. Simplot Co.***, 26 F.3d 885, 890-91 (9th Cir.1994), the Ninth Circuit held that, where a plaintiff establishes a ***prima facie*** case of employment discrimination, and the defendant offers evidence of a nondiscriminatory explanation for its action, judgment for the defendant is appropriate only "when evidence to refute the defendant's legitimate explanation is **totally lacking** even though plaintiff may have established a minimal prima facie case ..." See, also ***Washington v. Garrett***, 10 F.3d 1421, 1434 (9th Cir.1994).

Wallis and ***Washington*** impose a sensibly burden upon the Title VII plaintiff to produce some relevant evidence to demonstrate existence of a genuine issue of fact on the issue of pretext. Thus, where there is a total lack of relevant evidence, the motion for summary judgment should be granted. Such a rule is easy to administer and is more likely to produce uniformity of results among different panels. District Courts should examine the record to determine if the Title VII plaintiff has any admissible evidence to prove pretext.

On a motion for summary judgment, District Courts are not empowered to weigh whether or not the employer's explanation is more compelling than any evidence the Title VII plaintiff produces to show that the employer's explanation is pretextual or discriminatory. A rule which allows District Courts to do so defeats ***McDonnell Douglas'*** promise that the Title VII plaintiff must be allowed "a fair opportunity to demonstrate" that the employer's explanation is "a pretext or discriminatory in its application." ***McDonnell Douglas v. Green***, ***supra***, at 807. Such a rule also exceeds the power

expressly granted District Courts to summarily dispose of actions on their merits prior to trial by Rule 56 itself. In this case, in reliance on its decision in ***Godwin***, the Ninth Circuit devalued or explained away Petitioner's evidence which showed that Respondent's explanations were pretextual or discriminatory.

The Ninth Circuit ruled that the District Court correctly rejected Petitioner's evidence that she lacked the "strong written communication skills" Respondent claimed were required for promotion to the E6 Marketing Specialist position. (Appendix A, ***infra***, at 4a). Petitioner offered evidence that during the past six years of her employment that Respondent had praised her communications skills. Ignoring Petitioner's evidence the Ninth Circuit, which applies a de novo standard or review, failed to apply a fundamental Rule 56 principle that "the nonmoving party's evidence 'is to be believed and all justifiable inferences are to be drawn in [that party's] favor.'" ***Hunt v. Cromartie***, ***supra***, 99 C.D.O.S. 3567, at 3568, citing ***Anderson***, ***supra***, at 255. A trier-of-fact could draw a reasonable inference from evidence about Respondent's past expression of satisfaction with Petitioner's communication skills that its claim it did not promote her because she lacks such skills is pretextual.

In affirming the District Court's ruling that Respondent did not discriminate against Petitioner in promoting Cathleen Morgan-Marino to a newly created position in Petitioner's department, the Ninth Circuit ignored Petitioner's evidence that Jay Friedman was instrumental in securing the promotion for Ms. Marino. By assisting Ms. Marino to secure the position, Mr. Friedman thereby blocked Petitioner from regaining an E6 position. Petitioner's position was releveled downwards to an E4 in 1991 after she spoke to Mr. Friedman about the racially discriminatory remarks attributed to him. Before Petitioner

spoke to Mr. Friedman about his comments, she had not suffered any adverse employment action. A reasonable trier of fact could draw a reasonable inference in favor of Petitioner from this evidence.

The Ninth Circuit affirmed the District Court's ruling that Respondent did not discriminate against Petitioner by failing to relevel her position from E4 to E6. Both the Ninth Circuit and the District Court discredited Herndon's evidence that the review was flawed and incomplete. (Appendix A, ***infra***, at 6a). Courts may not discredit a party's evidence and grant summary judgment in favor of the moving party. Rule 56(c) only allows summary judgment to be entered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Rule 56(c) cited and quoted in ***Celotex Corporation v. Catrett***, ***supra***, at 322.

Petitioner applied for an E5 position in another department. Respondent awarded the position to a white male. The only explanation that Respondent offered was that the department manager preferred someone else. (AppendixA, ***infra***, at 6a). The Ninth Circuit and the District Court credited Respondent's explanation notwithstanding the fact all of the nonminorities in Petitioner's department were promoted except her. The courts below discounted evidence Petitioner offered that the CEO of the company was hostile to affirmative action and evidence that women employees at Sun felt that African American employees "have it ... worse" than they did. (Appendix A, ***infra***, at 8a).

The Ninth Circuit flat out ignored Petitioner's evidence that when Respondent refused to reconfigure her job assignment that the decision makers knew that she had filed complains with the OFCCP. (Appendix A, ***infra***, at 6a, 7a). Petitioner's immediate management staff was notified of Plaintiff's complaint to the OFCCP on April 13, 1995, before Respondent refused to reconfigure Petitioner's position.

In the courts below, Petitioner claimed that she was given a negative performance in 1995 which was both discriminatory and retaliatory. The Ninth Circuit failed to find error in the fact that the District Court simply "credited Sun's explanation that Herndon's evaluation was 'due to consistent errors in her work." (Appendix A, ***infra***, at 7a). The Ninth Circuit and the District Court faulted Petitioner because she did not offer direct evidence "to rebut the 'valid reason for the negative evaluation.'"

Petitioner offered indirect evidence that her supervisor who made the negative evaluation was "looking for dirt on" her. (Appendix A, ***infra***, at 7a). The Ninth Circuit and the District Court even credited the supervisor's denial that he made the remarks even though Petitioner offered direct evidence that he did make them. "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict." ***Anderson v. Liberty Lobby***, ***supra***, at 255.

The standards the Ninth Circuit uses to decide appeals in employment discrimination cases in which the employer moves for summary judgment in effect encourage District Courts to conduct bench trials rather than decide the motion in

accordance with Rule 56 and the general guidelines set forth by this Court. In this case, the Ninth Circuit, unlike the Third Circuit, ignored the fact that a Title VII plaintiff does not have to produce 'evidence directly contradicting the defendant's proffered legitimate explanations ..." ***Fuentes v. Perskie***, 32 F.3d 759, at 764 (3rd Cir.1994).

Nor does a Title VII plaintiff have to "cast doubt on each proffered reason in a vacuum." (***Ibid***, at 764-65, n.7). To avoid summary judgment, it is sufficient for the plaintiff to discredit some of them, which may alone sufficiently erode the employer's credibility "so that a factfinder may rationally disbelieve the remaining proffered reasons, ..." (***Ibid***, n.7, 764-65).

CONCLUSION

For the reason stated, Petitioner respectfully submits that the writ prayed for should issue.

Respectfully submitted,

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September 15, 1999

APPENDIX

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 98-15873

D.C. No. CV-95-20748-RMW

DENISE HERNDON,
Plaintiff-Appellant,

v.

SUNSERVICE, a division of Sun Microsystems, Inc.,
Defendant/Appellee.

FILED

MAY 27 1999

MEMORANDUM[1]

Appeal from the United States District Court
for the Northern District of California
Ronald M. Whyte, District Judge, Presiding

Argued and Submitted May 14, 1999
San Francisco, California

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[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

Before: FERGUSON and THOMAS, Circuit Judges and KING,[2] District Judge

Denise Herndon brought this Title VII action against her former employer, SunServices ("Sun"), alleging race discrimination and retaliation. The district court granted summary judgment, ruling that some of Herndon's claims were time-barred and that she failed on the remaining claims to demonstrate that Sun's justifications were pretextual. We affirm.

DISCUSSION

1. Time-Barred Claims

Title VII provides that a plaintiff must file a charge with the EEOC within 180 days of the alleged unlawful employment practice or within 300 days if state of local proceedings had been instituted. 42 U.S.C. § 2000e-5(e)(1). The parties agree that the 300-day limitations period applies to Herndon's claims. The district court applied that limitations period, ruling that Herndon could not rely on events that occurred prior to June 3, 1993.

We agree with the district court. First, Herndon admitted in her opposition to summary judgment that "the only actionable portions of Plaintiff's claims are from the 1993 period on." Second, Herndon has not demonstrated "a pattern and practice" of discrimination that would permit us to apply the "continuing violation doctrine." See Gutowsky v. County of Placer, 108 F.3d 256, 259 (9th Cir. 1997). She has alleged only a series of incidents involving her employ-

2 The Honorable Garr M. King, United States District Judge for the District of Oregon, sitting by designation.

ment. In such instances, "the question . . . boils down to whether sufficient evidence supports a determination that the alleged discriminatory acts are related closely enough to constitute a continuing violation." Green v. Los Angeles County Superintendent of Sch., 883 F.2d 1472, 1480 (9th Cir. 1989)(internal quotation omitted).

The district court correctly concluded that Herndon failed to show that the alleged acts were related. For example, there is no commonality of personnel; her supervisors and evaluators in every alleged incident were different. Herndon simply contends, without supporting evidence, that all of the acts are related. Her allegation is not sufficient, however, to permit us to consider the incidents that predate the limitations period of Title VII. See id. at 1481.

2. Pretext

Title VII prohibits employment discrimination based on race. See 42 U.S.C. §§ 2220e & e-3. Because Herndon lacked direct evidence of intentional discrimination, she sought to rely on a presumption of discrimination by establishing a prima facie case. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); Tarin v. County of Los Angeles, 123 F.3d 1259, 1263-64 (9th Cir. 1997). We conclude that Herndon met the burden and that Sun responded with legitimate, non-discriminatory reasons for its employment decisions. Thus, this case turns on the district court's final determination in each instance that Herndon failed to raise a triable issue of fact that Sun's proffered justifications were pretextual. See Tarin, 123 F.3d at 1264 (describing shifting burdens of proof in Title VII actions).

Herndon argues that she met her burden. Specifically,

she contends that she raised a triable issue of fact regarding each of the following acts by Sun: (a) the rejections of her application for an E6 Marketing Specialist position; (b) the failure to consider her for a new E6 position; (c) the rejection of her request for upward releveling; (d) the decision not to interview her for the position of Project Coordinator; (e) the decision to reconfigure her job; and (f) the issuance of a negative performance evaluation after her job was reconfigured. Our task is to decide whether the district court correctly concluded that Herndon failed to offer sufficient evidence to raise a triable issue of fact. Her evidence must be "specific and substantial" in order to avoid summary judgment. See Godwin v. Hunt Wesson, Inc. 150 F.3d 1217, 1222 (9th Cir. 1998). We conclude that for each of the alleged acts of discrimination and retaliation, the district court properly held that Herndon failed to meet her burden.

a. Marketing Specialist Position

Herndon applied for an E6 Marketing Specialist position. She was interviewed by Tom Berghoff who decided that she did not possess sufficient written communication skills for the position. Herndon first contends that Berghoff added that requirement to the job to justify rejecting her application. The district court correctly noted, however, that the original job posting stated that the position required "strong written communication skills." Herndon further contends that Sun's proffered justification that she did not possess the requisite communication skills was a pretext. The court rejected that contention noting that Herndon "merely asserts that she was qualified for the position," but did not offer any other evidence. Herndon attempts to rectify that omission by arguing on appeal that the district court failed to give weight to prior evaluations that had praised her

for her communication, leadership and managerial skills. The position, however, also required "strong writing skills, [and] project management or reporting experience" that Sun reasonably believed Herndon did not possess.

b. New E6 Position

Cathleen Morgan-Marino transferred into Herndon's department as an E6. Herndon was not considered for this new position because her supervisor believed that she could not perform the required duties. Herndon contends that this reason was a pretext because she did, in fact, perform Marino's job while Marino was on disability leave. The district court, however, rejected Herndon's contention concluding that "the evidence of record reveals that Herndon was merely assigned duties appropriate for an E4 level position." The court noted that the evidence did not show that Herndon ever "conducted meetings and out-of-country training, wrote processes and procedures, and coordinated work with external vendors" that were Marino's responsibilities. Finally, the court properly rejected Herndon's submission of other employees' statements supporting her allegation that she was qualified for Marino's E6 position. The court found them to be "generalized and conclusory statements" and inconclusive of whether "any of the declarants knew the extent of Marino's job functions and whether Herndon had the ability to perform each of them."

c. Releveling

Herndon's request to have her E4 position "releveled" to an E6 grade was denied by Sun. Sun responded ot Herndon's charge of discrimination by producing evidence that John Hytinnen, the administrator who denied the request,

did not know Herndon's race at the time of his decision, and accordingly, he could not have intentionally discriminated against her based on her race. Herndon does not dispute Hytinnen's declaration, but rather contends that the review of her request was flawed and incomplete. The district court was correct, however, in reasoning that whether releveling determinations are subjective is immaterial in the absence of evidence that the "process was wrongfully manipulated in her specific case."

d. Project Coordinator Position

Herndon applied for an E5 position in another department. She was not interviewed and the job was awarded to another applicant. The district court accepted Sun's explanation that the manager of that department, Terry Rand, preferred to promote someone with experience from within the department. We agree with the district court that Herndon failed ot offer any evidence to indicate that Sun's proffered reason was a pretext either for discrimination or retaliation.

e. Reconfigured Job Assignments

Herndon argues that Sun's decision to reconfigure her job and to assign her new and different tasks was both discriminatory and retaliatory. She specifically complains that she was assigned one of Marino's former tasks without a corresponding releveling of her position or a promotion. Sun countered the discrimination charge with evidence that Herndon's new assignments were appropriate and consistent for her E4 classification. Sun also submitted evidence that the decision makers could not have intended to retaliate against Herndon because at the time of the reconfiguration

they did not know that Herndon had filed discrimination claims. Herndon offered nothing to rebut this explanation and, accordingly, she did not raise a triable issue of fact.

f. Negative Performance Evaluation

Herndon received a negative performance evaluation after she was given new job assignments. She asserts that the evaluation was both discriminatory and retaliatory. The district court, however, credited Sun's explanation that Herndon's evaluation was "due to consistent errors in her work." The court rejected Herndon's claim of discrimination, noting that she failed to offer evidence to rebut the "valid reason for the negative evaluation." Herndon also submits that the negative evaluation was motivated by retaliation for her prior filing of administrative complaints. She points to evidence that Tom Berghoff talked to co-workers regarding her complaint, allegedly "looking for dirt on Denise," to defeat her claims of discrimination. Berghoff denied the comment but admitted that he was tasked to respond to Herndon's administrative complaint and did talk to other employees. We agree with the district court that Herndon failed to demonstrate retaliation; she did not offer evidence to rebut Sun's justification that she, in fact, did not perform part of her new job function.

3. Other Evidence of Discrimination

Finally, Herndon argues that the district court erred by not crediting her evidence of disparate treatment of other minority employees. She offers, for example, the fact that certain non-minority employees were promoted during the time that she and other minorities were not. She also cites statements from other minorities who claim to have been

denied promotions. She relies on a statement apparently made by Sun's CEO, Scott McNealy, that he resented the government telling him who he can hire and not hire, on a report that found disparity in the number of African-Americans employed in high executive positions at Sun, and on a survey conducted by women employees at Sun that concluded that minority employees "have it [the] worse."

There is no question that evidence regarding an employer's policy and practices "may be helpful" in establishing that a particular employment decision was in conformance with a general pattern of discrimination. See McDonnell Douglas, 415 U.S. at 805; Warren v. City of Carlsbad, 58 F.3d 439, 443 (9th Cir. 1995). Here, Herndon has not established, however, that she was qualified for any of the positions cited, whether minorities ever applied for the promotions, or even the identity of the decision makers. None of her testimonial evidence involved any of the individuals that she submits discriminated against her. Under such circumstances, the district court reasonably concluded that Herndon's evidence was not relevant to her individualized claim of disparate treatment. See Penk v. Oregon State Bd. of Higher Educ., 816 F.2d 458, 462 (9th Cir. 1987)(noting that usefulness of statistical evidence to prove pretext "depends primarily upon [its] relevance to the specific decision affecting the individual plaintiff").

Herndon argues that the district court should have construed her evidence to establish a claim of hostile work environment. We agree with Sun, however, that Herndon's evidence is not sufficient to establish such a claim. She has not shown that her workplace was "permeated with discriminatory intimidation, ridicule, and insult . . . that is sufficiently severe or pervasive to alter the conditions of [her]

employment and create an abusive working environment." See Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993). Similarly, Herndon has failed to establish a disparate impact case. She has not alleged the existence of a facially neutral employment policy that in fact impacted more harshly on one group than another and that cannot be justified by business necessity. See Hazen Paper Co. v. Biggins, 507 U.S. 604, 609 (1993).

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

D.C. No. CV-95-20748-RMW (PVT)

DENISE HERNDON,

Plaintift,

v.

SUNSERVICE, a division of Sun Microsystems, Inc.,

Defendant.

FILED

APRIL 8 1998

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant's motion for summary judgment or, in the alternative, for partial summary judgment was heard on March 27, 1998. The court has read the moving and responding papers and heard the oral argument of counsel. For the reasons set forth below, the court grants defendant's motion for summary judgment.

I. BACKGROUND

Plaintiff Denise Herndon ("Herndon") brings this action against SunService ("Sun"), a division of Sun Microsystems, Inc., alleging intentional discrimination in violation of Title VII. Herndon also alleges that Sun retaliated against her for filing charges of discrimination with the EEOC and the Office of Federal Contract Compliance Programs ("OFCCP"). Additionally, Herndon also alleges a claim for intentional infliction of emotional distress arising out of Sun's discriminatory and retaliatory actions toward her.

On June 9, 1986, Sun hired Herndon as a Response Coordinator II, an E3 level position.[1] During her initial years of employment, Herndon received satisfactory or better performance ratings and several promotions. On April 23, 1990, Eileen Marshall selected Herndon for a promotion to Marketing Analyst/Scheduler, a level E6 position. According to Sun, Herndon's performance in this new position was unsatisfactory. In Herndon 1991 evaluation report, her performance was evaluated as "not meeting the minimum job requirements." Ex. 1, attached to Marshall Declaration. Consequently, her workload and responsibilities were

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[1] Sun assigns all jobs a certain grade level (e.g. E6); each grade level is given a salary range. Sun's Compensation Unit assigns the appropriate grade level to each job within Sun. According to Sun the sole inquiry is whether the functions of the job are the same or similar to the functions of other jobs at the same level.

reduced. Herndon also received additional training. Herndon's workload was further reduced after continued failure to meet the requirements of the position. On August 26, 1991, Herndon was demoted from a level E6 to a level E4 employee; her salary and benefits remained the same. As to the 1991 evaluation report, Herndon contends that Marshall retaliated against Herndon for confronting Jay Friedman, Director of Marketing, about his alleged racial bias and consequent failure to promote African Americans. Herndon Deposition at 588:15-213 (Ex. 3, attached to Lindstrom Declaration).

Herndon's performance, however, began to improve. In February 1992, Herndon's new supervisor Jay Pederson evaluated her performance as consistently meeting job requirements. On February 10, 1992, Herndon contacted Sun's Human Resources Department to ask that her 1991 Evaluation Report be revised. After an investigation, the Human Resources Department denied the request. Herndon contends that thereafter she was "blackballed" from opportunities for promotion at Sun in retaliation for complaining about her 1991 evaluation.

Herndon identifies a number of promotional opportunities which Sun denied for allegedly racially discriminatory or retaliatory reasons. On April 30, 1992, Herndon applied for a Project Coordinator position. Herndon was informed that a more senior level employee was preferred for the position.

Herndon also contends that in late 1993 she was not informed of an unposted opening in her department which was filled by Cathleen Morgan-Marino. Sun contends that there was no actual job opening. Rather, Sun asserts that Marino, otherwise facing a lay-off, was transferred from another department to relieve Odette Rickert, Herndon's supervisor, of some of her responsibilities. Sun also asserts that Herndon could not have performed many of the duties required of Marino's position. Specifically, Sun asserts that Herndon lacked requisite presentation, public speaking and written communication skills.

Herndon also alleges that Sun's failure to "re-level" her position in January 1994 was wrongful.[2] Sun asserts that Herndon's race had nothing to do with the decision to maintain Herndon's position at the E4 level. John Hytinnen, Sun's Compensation Manager, did not personally know Herndon, her race, or whether she filed a complaint with Human Resources in 1991. Hytinnen Declaration ¶ 5. After reviewing Herndon's then-current job description, Hytinnen ultimately concluded that it warranted no higher than E4 status. Herndon, on the other hand, argues that the re-leveling procedure is highly subjective and is often manipulated to promote white employees into positions that could have been filled by qualified African Americans. See

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[2] At Sun, the Compensation Unit reevaluates or the job description held be employees to determine whether it has been accorded the proper grade level --a process referred to as "re-leveling."

Poole Declaration ¶ 7; Montgomery Declaration ¶ 6 (African-American employee at Sun who interviewed and was selected for E9 position which was subsequently re-leveled to E4 grade); Greer Declaration ¶ 4, 5; Montalvo Declaration ¶ 7.

On April 29, 1994, Herndon filed a charge with the EEOC alleging that Sun discriminated against her by not re-leveling her job to a higher grade. In her EEOC complaint, Herndon also alleged that Sun retaliated against her for complaining about her negative evaluation report of 1991.

On May 2, 1994, Rickert, Herndon's supervisor, transferred out of the department. In April 1994, Rickert rated Herndon's performance as exceeding the job's requirements. Tom Berghoff, a second level manager, became the acting supervisor of Herndon's group, while Sun searched for a replacement. Herndon alleges that from April 1994 to January 1995 she performed supervisory duties since Berghoff often traveled away from the office. Herndon also alleges that she performed the bulk of Marino's E6 level duties, while Marino was on maternity leave.[3] Herndon asserts that during this period of heightened responsibility, Herndon received no promotion or re-leveling. Sun contends

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However, plaintiff directs the court to evidence which appears only to indicate that Herndon assumed Marino's Passport docu ment editing function. See Exs. 7A-7D, attached to Herndon Declaration.

that Herndon performed no supervisory work.[4] Sun submits that when Berghoff would be called be called away from the office, he would ask Herndon to take a "non-supervisory lead role over Herndon's co-worker [Christina Atilano]." Motion at p. 8. See also Berghoff Declaration ¶ 6. Sun also contends that Herndon assumed only a minor portion of Marino's duties, while Marino was on maternity leave. Berghoff Declaration ¶¶ 4, 5.

In October 1994, Terry Bond allegedly approached Herndon about a job opening as a level E5 Project Coordinator. Herndon submitted a resume, but was never interviewed for the position. When Herndon later inquired about the position, Bond told her that he chose someone with more experience in Sun's education department. Herndon alleges that her failure to receive this promotion resulted from her February 1992 complaint to Human Resources. Plaintiff asserts that she was qualified for the position; however, plaintiff points the court to no supporting evidence.

On November 7, 1994, Herndon filed a complaint with the Office of Federal Contract Compliance Programs alleging race discrimination and retaliation in violation of

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[4] Herndon's evaluation report, signed by Berghoff on April 26, 1994, contradicts this assertion. See Ex. 1-B, attached to Herndon Declaration ("[Herndon] has been working on an increasingly independent basis, working as the de facto system supervisor during her manager's transition into another position.")

Executive Order 11246[5]

Herndon also alleges that Sun harassed her by asking her to participate in a group photograph which was intended to illustrate the racial diversity of Sun's work force. Herndon refused to pose for the picture and later complained to Human Resources. Human Resources investigated Herndon's complaint and determined that while the purpose of the photo was a legitimate company purpose, the photographer was asked to be more sensitive when working on similar projects in the future.

On January 23, 1995, Sun hired Valerie Hirsch to supervise Herndon's group. Hirsch said Berghoff began planning a reorganization of the group. After reviewing the respective job functions in the group, Hirsch and Berghoff decided to reorganize everyone's job duties. Hirsch Declaration ¶ 11. Herndon alleges that the changes to her job were in retaliation for filing her OFCCP complaint. However, Sun points out that Herndon was presented with her new job description on March 13, 1995. Sun received notice of Herndon's OFCCP charge on April 3, 1995. Davis Declaration ¶ 4. Hirsch and Berghoff were actually informed of the complaint on April 13, 1995. Id.; Hirsch Declaration 5; Berghoff Declaration ¶ 11. Sun also contends that the changes in Herndon's job duties were not substantial. Sun assigned Herndon the task of editing the Passport database,

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[5] However, the OFCC did complete an investigation and found plaintiff's claims to be without merit.

formerly one of Marino's duties. Herndon complained to Human Resources that this job reassignment without a promotion was unfair, because Marino, an E6 level employee, had previously performed the Passport editing function. Sun contends, however, that the Passport editing function is appropriate for an E4 level job and that no grade level change was warranted. Herndon contends that the job functions were assigned to her because Marino was incapable of adequately performing them. Atilano Declaration ¶¶ 8, 9, 10. Herndon also finds it curious that Marino was promoted to an E8 level position during the reorganization despite her poor performance in some aspects of her job.

Herndon contends that, in July 1995, Berghoff telephoned a Sun employee, "looking for dirt on Denise" in order to defeat her OFCCP complaint. Lopez Declaration ¶ 6. Plaintiff also contends that she was subjected to heightened scrutiny and discipline. Atilano Declaration ¶ 16; Herndon Deposition at p. 499:24 - 501:22, attached as Ex. 3 to Lindstrom Declaration; Ex. 17, attached to Herndon Declaration.

On July 14, 1995, Herndon applied for a posted E6 Marketing Support Specialist position. Berghoff gave plaintiff an informational interview. Herndon asserts that Berghoff informed her of "added requirements" above those contained in the job listing in an effort to discourage her from applying. Sun argues that the job listing was not

intended to contain a complete list of requirements.[6] Further, Sun argues that the listing stated that the applicant should possess "strong written communication skills, project management and reporting experience," which Sun asserts were lacking in Herndon. Berghoff Declaration ¶ 7.

On August 14, 1995, Herndon brought this action against Sun. She provided Sun a copy of the complaint on or about September 19, 1995. Kato Declaration ¶ 4/ Herndon alleges that Sun retaliated against her for filing her discrimination complaint by giving her a lower performance evaluation. Berghoff and Hirsch prepared plaintiff's performance evaluation in August 1995. Berghoff Declaration ¶ 14; Hirsch Declaration ¶ 14. In September 1995, Herndon received her performance evaluation which indicated that although she was meeting some of her job's requirements, "key areas" required improvement. According to Sun, Hirsch and Berghoff placed Herndon on a Performance Improvement Plan ("PIP") after plaintiff's performance continued to be deficient. Soon after being placed on PIP status, Herndon left Sun on a disability leave of absence and has not returned to Sun. Sun now moves for summary judgment.

II. LEGAL STANDARD

Summary judgment is proper if the record indicates

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[6] However, Herndon points to contemporaneous job listings having lengthy, detailed job descriptions. See Ex. 9, Herndon Declaration.

there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. § 56(c). A genuine issue of material fact exists only when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 106 S.Ct. 2505, 2510 (1986). Rule (56c) mandates that the entry of summary judgment against a party who fails to make a showing sufficient to establish the existence of an element essential ot that party's case, and on which that party will bear the burden of proof at trial. Celotex Corp. v. Catrett, 106 S.Ct. 2548, 2552-53 (1986). The nonmoving party must reference specific facts to create a triable issue of fact. T.W. Elec. Serv. v. Pacific Elec. Contractors, 809 F.2d 626, 630 (9th Cir. 1987). The court views all evidence in a light most favorable to the nonmoving party. Masson v. New Yorker Magazine, Inc., 111 S.Ct. 2419, 2434-35 (1991). However, "the mere existence of a scintilla of evidence in support of plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." Anderson, 106 S.Ct. at 2512. Credibility determinations, weighing evidence, and drawing inferences are jury functions, not those of a judge deciding a motion for summary judgment. Liberty Lobby, 106 S.Ct. at 2513. The evidence of the nonmoving party is to be believed, an all justifiable inferences are to be drawn in its favor. Id.

III. ANALYSIS

A. HERNDON'S CLAIMS ARE BARRED TO EXTENT PLAINTIFF

RELIES ON EVENTS PRE-DATING JUNE 3, 1993.

Sun asserts that Herndon's claims arising out of her 1991 negative performance evaluation and demotion, as well as Dan Gizowski's alleged failure to promote plaintiff in April 1992, are barred since these events arose more than 300 days before plaintiff filed her EEOC complaint on April 29, 1994. Plaintiff appears to concede to Sun's argument. See Opposition at p. 2. Accordingly, the court dismisses Herndon's claims to the extent they rely on events which occurred before June 3, 1993.[7]

B. EMPLOYMENT DISCRIMINATION

Sun argues that Herndon has failed to establish a prima facie case as to: (1) Cathleen Marino's transfer, (2) Berghoff's E6 Marketing Support Specialist position, and (3) the 19 identified employees promoted during Herndon's employment. As to these and the remaining alleged adverse employment decisions, Sun argues that legitimate, nondiscriminatory reasons existed.

1. Prima Facie Case

To establish a prima facie case of race discrimination,

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[7] Herndon Contends that the events are still admissible to show a pattern of discrimination against her. However, it appears that the connection between these older, non-actionable events and the events after the 1993 period is too tenuous to be used in the manner intended by plaintiff.

a plaintiff must identify actions by the employer, that if unexplained, give rise to an inference of discriminatory conduct. Furnco Const. Corp. v. Waters, 98 S.Ct. 2943, 2949 (1978). This determination involves no rigid or exclusive test; "the facts necessarily will vary in Title VII cases, and the specification ...of the prima facie proof required from [plaintiff] is not necessarily applicable in every respect to differing factual situations." Id. (citations omitted). However, most of the circumstances in the present case appear to be appropriately assessed under the standard articulated by Sun and adopted by Herndon. Therefore, Herndon must prove: (1) that she is African-American; (2) that she was qualified for the position held (of applied for); (3) that she was demoted from that position or ultimately discharged (or that her application was denied); and, (4) that the position remained open and was ultimately filled by a Caucasian employee. See St. Mary's Honor Center v. Hicks, 113 S.Ct. 2742, 2747 (1993). To survive a motion for summary judgment, a plaintiff need only produce evidence sufficient to support a reasonable inference of the existence of the fact at issue. See Foster v. Arcata Associates, Inc., 772 F.2d 1453, 1459 (9thCir. 1985), *holding limited by,* Kennedy v. Allied Mut. Ins. Co., 952 F.2d 262 (9th Cir. 1991).

a. Marino Transfer

Sun argues that there was no job opening at the time Marino was transferred into Herndon's group. Sun argues that Marino's transfer to Herndon's group was merely a

reorganization move to retain a valued employee who would otherwise have been laid off. The failure to prove the existence of a job opening is fatal to a claim of discrimination. See Chavez v. Tempe Union High School, 565 F.2d 1087, 1091 (9th Cir. 1977). However, in the promotion context, a plaintiff need not point ot a specific job opening. See Rich v. Martin Marietta Corp., 522 F. 2d 333, 347-48 (10th Cir. 1975)(in promotion context, plaintiff need oily make prima facie showing that she was qualified for promotion); see also Gay v. Waiters' and Dairy Lunchmen's Union, 694 F.2d 531, 547 (9th Cir. 1982)(distinguishing Rich v. Martin Marietta).

b. E6 Marketing Support Specialist Position

Sun argues that Herndon cannot show that she was qualified for the E6 Marketing Support Specialist position since the position required strong written communication skills, project management and reporting skills. Herndon's opposition does not directly respond to this argument. Rather Herndon argues that when she applied for the position, she was informed of additional requirements for the job that were not contained in the listing. See Ex. 9, Herndon Declaration. However, the original job posting indicated that the position required strong written communication skills, Herndon merely asserts that she was qualified for the position, but points this court to no evidence that creates a triable issue of fact.[8]

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[8] The failure to specifically reference triable facts is fatal to a party's opposition to a motion for summary judgment. The court is under no

c. Promotion of 19+ Employees

Sun argues that Herndon cannot establish a prima facie case as to the promotions of 21 employees identified by plaintiff, since she did not apply for any of these positions and knows nothing about the qualifications of those persons selected for the respective positions. Again, Herndon's opposition does not directly respond to this argument. Accordingly, Herndon has failed ot raise a triable issue of facts as to these promotions.

2. McDonnel Douglas Presumption

Establishment of a prima facie case creates a presumption that the employer unlawfully discriminated against the employee. Texas Dep't of Community Affairs v. Burdine, 101 S.Ct. 1089, 1094 (1981)(citing McDonnell Douglas Corp. v. Green, 93 S.Ct. 1817 (1973)). This presumption places upon the defendant employer the burden of producing evidence which explains why the alleged adverse employment actions were taken for "a legitimate, nondiscriminatory reason." Hicks, 113 S.Ct. at 2747

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obligation to sift through the entire record to determine whether a triable issue of facts exists. See Gasaway v. Northwestern Mut. Life Ins. Co., 26F.3d 957, 959-60 (9th CIr. 1994)(non-moving party ot summary judgment motion may not rely on mere allegations or denials); see also Frito-Lay, Inc. v. Willoughby, 863 F.2d 1029, 1033-34(d.c. Cir. 1988)(once moving party has satisfied its burden, responding party must respond with specific facts and references to the location of those facts in the record).

(citations omitted). If the employer meets its burden of production, the McDonnell Douglas presumption is disregarded. Id. The plaintiff then has the burden of demonstrating that the employer's proffered reason is merely a pretext. See Lindahl v. Air France, 930 F.2d 1434, 1437 (9th Cir. 1991). On a motion for summary judgment, a plaintiff "must produce specific facts either directly evidencing a discriminatory motive or showing that the employer's explanation is not credible." Lindahl, 930 F.2d at 1438. However, due to the fact intensive nature of the inquiry, the plaintiff need produce "very little evidence of discriminatory motive to raise a genuine issue of fact." Id.

a. Marino Transfer

Sun argues that legitimate, nondiscriminatory reasons existed for denying plaintiff the position into which Marino transferred. Rickert, Herndon's supervisor, felt that plaintiff could not perform the duties of the position --- i.e., conducting meetings and out-of-country training, writing processes and procedures, and coordinating work with external vendors. Although Herndon asserts that she was ultimately assigned the "bulk of [Marino's duties," the evidence of record reveals that Herndon was merely assigned duties appropriate for an E4 position. The evidence of record does not indicate whether Herndon also conducted meetings and out-of-country training, wrote processes and procedures, and coordinated work with external vendors. Several of plaintiff's former co-workers indicate that Herndon was qualified to perform Marino's job functions. See Atilano

Declaration ¶ 4, 10; Fisher Declaration 9; Montalvo Declaration 12. However, such generalized and conclusory statements fail to raise a triable issue of fact. The evidence of record does not demonstrate whether any of the declarants knew the extent of Marino's job functions and whether Herndon had the ability to perform each of them.

b. Compensation Review of Herndon's Position

Sun argues that its decision not to "re-level" Herndon's position did not involve intentional discrimination. Sun argues that the compensation manager performing the review did not even know Herndon or her race at the time of the evaluation. Hytinnen Declaration ¶ 5. Plaintiff argues that a re-leveling determination is highly subjective and is often manipulated in favor of Caucasian employees. However, plaintiff points to no evidence to support an argument that the re-leveling process was wrongfully manipulated in her specific case.[9]

c. Project Coordinator Job

Sun argues that Terry Bond's preference for someone

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[9] Plaintiff does point out that discovery into individual employees personnel records that would show disparate treatment relating to career advancement is still outstanding. However, the discovery appears to relate to promotions rather than the "re-leveling" and, in any event, would not establish that Sun's decision not to re-level plaintiff's position was discriminatory.

in Sun's education department was the basis for Herndon's never being interviewed for the position as Project Coordinator. Herndon offers no evidence demonstrating that Sun's proffered reason is merely a pretext. Therefore, not material issue of fact exists as to Herndon's claims relating to the Project Coordinator position.

d. Group Photograph Incident

Sun also argues that Herndon's being asked to participate in a group photograph of employees intended to show the diversity of Sun's workforce may not lie as a basis for an intentional discrimination claim. Plaintiff merely responds by stating that the way she was approached was inappropriate and that she did not wish to be a "token minority." Opposition at p. 9. Plaintiff does not demonstrate, however, how this alleged discrimination constitutes intentional employment discrimination. See Stallcop v. Kaiser Foundation Hospitals, 820 F.2d 1044, 1050-51 (9th Cir. 1987)("derogatory ethnic statements, unless excessive and opprobrious, ar insufficient to establish a case of national origin discrimination.")

e. Assignment of New Duties to Herndon

Sun argues that Herndon was assigned new duties as a result of a department reorganization pursuant to which Marino left the department. Sun contends that Herndon was assigned only one of Marino's former tasks, editing the Passport database, which Sun felt was appropriate for

Herndon's E4 level position. Herndon appears to argue that she was assigned Marino's former duties without a corresponding re-leveling of her position or a promotion. Atilano Declaration ¶ 13. Furthermore, Herndon points out that although Marino was assisted by independent contractors as to "Passport Document" duties, Herndon received no such assistance when those duties were passed on to her. Atilano Declaration ¶ 13. However, the evidence suggests that the duties assigned to Herndon were appropriately assigned to an E4 level employee such as plaintiff. Therefore, the assignment of new duties to Herndon does not appear to be discriminatory or retaliatory.

f. Unsatisfactory Performance Evaluation of 1995 and Asserted Lack of Support

Sun argues that Herndon received a negative performance evaluation because she did not perform her Passport Document editing duties in a satisfactory manner. Sun also asserts that it placed Herndon on a performance improvement plan after the alleged deficiencies persisted. Herndon argues that the manner in which she received her performance evaluation violated Sun's own guidelines.[10] In addition, Herndon does not directly respond to the apparently valid reason for the negative evaluation, namely consistent errors on the Passport database.

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[10] However, Herndon appears to rely on a voluntary IPR procedure which is not mandatory and was not invoked in the present case. Davis Supp. Declaration ¶ 6.

Herndon also alleges that she did not receive the training or support as that received by Marino. However, the evidence only indicates that Herndon was only discouraged from seeking a training class that did not relate to any of her existing duties. Plaintiff's other requests for training classes were approved. Accordingly, Herndon has failed to raise a triable issue of fact as to her 1995 Evaluation Report.

C. RETALIATION

Sun argues that Herndon has no evidence of a causal link between her complaints of discrimination and the alleged retaliatory acts. At least as to one instance of alleged retaliation, Sun argues that Herndon has no evidence demonstrating that Sun's purportedly legitimate and nondiscriminatory reasons for its actions are pretextual. Plaintiff's opposition to Sun's motion for summary judgment does not directly address these arguments.

To establish a prima facie case of retaliation under Title VII, a plaintiff must show"(1) that she was engaging in a protected activity, (2) that she suffered an adverse employment decision, and (3) that there was a causal link between the protected activity and the adverse employment decision." Tarin v. County of Los Angeles, 123 F.3d 1259, 1264 (9th Cir. 1997)(citation omitted). When the employee establishes a prima facie case, the burden of production shifts to the employer to articulate a legitimate, nondiscriminatory reason for the adverse employment decision. Id. If the employer meets its burden, the employee must prove that the

proffered reasons are merely pretextual. Id. An employer, however, may not rely on her own conclusory statements to refute the employer's explanations for its actions. Id. at 1265.

1. Project Coordinator Job

For the reasons discussed above in section III.B.2.c., Herndon has failed to present evidence demonstrating why Sun's asserted reason for denying her the Project Coordinator position is merely a pretext.

2. Reassignment of Job Functions in March 1995

The evidence reveals that Berghoff and Hirsch re-configured Herndon's job functions before they were made aware of the OFCCP complaint. Plaintiff does not respond to this argument. Therefore, no triable issue of facts exists as to whether plaintiff's additional job functions were motivated out of a desire for retaliation.[11]

3. 1995 Performance Evaluation Report

Sun argues that there is no evidence of any retaliatory motive for the negative evaluation of Herndon in 1995. Sun asserts that Herndon's negative evaluation was due to

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[11] Plaintiff also appears to argue that Sun assigned some of Marino's former job functions to Herndon because Marino was incapable of performing them. The court does not see how this establishes or raises an inference of discriminatory or retaliatory motive.

consistent errors in her work on the Passport database. Herndon points to the Lopez Declaration to show Berghoff's allegedly retaliatory motives. Namely, plaintiff asserts that Berghoff called Lopez attempting to gather information on plaintiff (i.e. "looking for dirt on Denise") in order to defeat her OFCCP complaint. See Lopez Declaration ¶ 6. Plaintiff contends that this fact alone raises a reasonable inference of retaliatory motive. Sun counters by offering evidence that Berghoff's participation in the OFCCP investigation was legitimate. Berghoff denies the retaliatory motive asserted by Herndon and the fact that he ever said that he was "looking for dirt" on plaintiff. Berghoff Supp. Declaration ¶ 2. In the present case, it appears that Herndon has provided sufficient evidence to demonstrate a prima facie case of retaliation. However, Herndon has failed ot introduce evidence to demonstrate that Sun's proffered reasons for the negative evaluation of plaintiff were pretextual since plaintiff does not directly respond to Sun's argument relating to plaintiff's consistent problems with the Passport database. Accordingly, plaintiff's claim for retaliation is dismissed.

D. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Sun argues that Herndon's claim for intentional infliction of emotional distress is preempted to the extent that her claims do not involve allegations of discrimination or retaliation. Herndon appears to agree.

The Worker's Compensation Act preempts a claim for intentional infliction of emotional distress to the extent the

matters raised by plaintiff lie within the normal employment relationship. See Shoemaker v. Myers, 52 Cal.3d 1, 25 (1990); Cole v. Fair Oaks Fire Protection District, 43 Cal.3d 148, 160 (1987)(intentional infliction of emotional distress claims based upon criticism of job performance or demotion are preempted).

Since no triable issues of fact exist as to Herndon's claims for intentional discrimination and retaliation, the court grants Sun's motion to dismiss plaintiff's claim of intentional infliction of emotional distress.

IV. ORDER

In light of the foregoing, the court grants Sun's motion for summary judgment.

DATED: 4/8/98

/s/ RONALD M. WHYTE
RONALD M. WHYTE
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

D.C. No. CV-95-20748-RMW (PVT)

DENISE HERNDON,

Plaintiff,

v.

SUNSERVICE, a division of Sun Microsystems, Inc.,

Defendant.

FILED

APRIL 8 1998

JUDGMENT

On April 8, 1998, this court granted summary judgment in favor of defendant. Therefore, it is hereby ordered that judgment be entered in favor of defendant and that plaintiff shall take nothing by way of her complaint.

The clerk shall close the file.

DATED: 4/8/98

/s/ RONALD M. WHYTE
RONALD M. WHYTE
United States District Judge

JUDGMENT
NO. C 95-20748 RMW
MJS

APPENDIX D

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 98-15873

D.C. No. CV-95-20748-RMW

DENISE HERNDON

Plaintiff-Appellant

v.

SUNSERVICE, a division of Sun Microsystems, Inc.

Defendant/Appellee

FILED

JUNE 18 1999

ORDER

**Appeal from the United States District Court
for the Northern District of California
Ronald M. Whyte, District Judge, Presiding**

Argued and Submitted May 14, 1999
San Francisco, California

Before: FERGUSON and THOMAS, Circuit Judges

and KING,[1] District Judge

The panel has voted to deny appellant's petition for rehearing. Accordingly the petition for rehearing is denied.

1. The Honorable Garr M. King, United States District Judge for the District of Oregon, sitting by designation.

Supreme Court, U.S.
FILED

No. 99-489

IN THE
SUPREME COURT OF THE UNITED STATES

DENISE HERNDON,
Petitioner,

vs.

SUNSERVICE, a Division of Sun Microsystems, Inc.
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S OPPOSITION TO PETITION

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QUESTION PRESENTED

Whether the Ninth Circuit's "specific and substantial" evidence standard to demonstrate pretext under Rule 56 is in conflict with any other circuit court or with any relevant decision of this Court.

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CITATION OF AUTHORITY

This case involves Federal Rule of Civil Procedure 56(e) which provides in relevant part:

> **(e) Form of Affidavits; Further Testimony; Defense Required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts

> showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

STATEMENT OF THE CASE

1. Introduction

In this disparate treatment claim of race discrimination, Petitioner Denise Herndon ("Plaintiff" or "Herndon") was unsuccessful in her attempts to rebut her employer's legitimate business reasons for its actions, and the Ninth Circuit properly affirmed summary judgment in favor of Respondent SunService (hereinafter "Defendant" or "Sun"). In her Petition, Herndon questions whether the Ninth Circuit's "specific and substantial" evidence standard to demonstrate pretext is consistent with FRCP 56. This Court should agree with the court of appeals that there was simply insufficient evidence to create a genuine triable issue. Further, the "specific and substantial" evidence standard applied by the Ninth Circuit is not in conflict with the other circuits nor does it conflict with the relevant decisions of this Court. Plaintiff has had her full day in several courts and the matter does not raise an important federal question deserving review by this Court.

SunService's business is to support and educate Sun Microsystem's customers regarding its products. SunService's Worldwide Marketing Department, where Herndon worked, is responsible for developing the SunService image for quality service and support. Plaintiff was a Marketing Services Coordinator (grade level E4) performing, for the most part,

work related to the updating of information contained in Sun's databases of products, parts and services.

2. Herndon's early employment and 1991 demotion.

The court of appeals ruled that Herndon could not rely on events that occurred prior to June 3, 1993 as such claims were time barred. Petitioner does not challenge this determination in her Petition. These early facts are presented only as background.

On June 9, 1986 Sun hired Herndon as a Response Coordinator II. Over the years, she received satisfactory or better performance ratings, and several promotions. On April 23, 1990, Herndon was selected by manager Eileen Marshall for a promotion to Marketing Analyst/Scheduler, a level E6 position.

After five years of admittedly nondiscriminatory employment, Herndon alleged that despite her outstanding performance, she was demoted in 1991. However, Herndon's work in the marketing analyst job was not outstanding. Herndon's supervisor, Marshall, explained that Herndon was not able to perform the job despite having twice reduced Herndon's workload and giving Plaintiff additional training. Marshall reduced Herndon from a grade level E6 to E4. However, Herndon's pay and benefits remained the same.

3. Marino transfers into Herndon's unit.

On about April 1, 1992, Rickert became Herndon's supervisor. In summer or early fall 1993, Rickert told her manager, Jay Friedman, that she needed someone to relieve her

workload by assuming certain of her duties. In response, Friedman mentioned to Rickert that an employee from another department, Cathleen Morgan-Marino ("Marino"), was available for reassignment. Marino was in the process of being laid off. Consistent with Sun's practice, the Company assisted Marino in finding another position within Sun.

Rickert interviewed Marino, and concluded she had the necessary skills. Before arranging Marino's transfer, Rickert consulted Human Resources ("HR") representative Norma Olmos about whether an "opening" should be posted on Sun's job posting system so other interested employees could apply. HR concluded posting was not required because there was in fact no job opening in Rickert's unit. Rather, this was a reorganization and transfer of needed skills, not the creation of a job opening as to require a posting. (Indeed, the group had no budget for this additional employee, and after Marino's transfer, her former unit continued to pay her salary until Rickert's group could obtain funding.) Also, HR reasoned if the job were posted and another individual selected, Marino would be laid off thereby defeating the purpose of finding her another job.

On September 6, 1993, Marino transferred into the group. She assumed several of Rickert's duties (including conducting meetings and out-of-country training, writing processes and procedures, and coordinating work with external vendors). Herndon admitted most of the tasks Marino assumed were previously Rickert's. Rickert concluded that Herndon could not have competently performed these duties. She was not a good writer, nor did she have experience in writing processes and procedures. In addition, Plaintiff lacked the presentation, public speaking, and training skills needed to perform the functions. Herndon admitted she does not know

whether Rickert discriminated in failing to give her Marino's job.

4. **Herndon's position was reviewed to ensure that it was at the correct level.**

Hewson further admitted that, in 1993, Rickert approached her and initiated an effort to have Herndon's position re-leveled to a higher grade. On November 2, 1993, Rickert submitted Herndon's job description to Sun's Compensation unit for re-evaluation.

At Sun, all jobs are assigned a grade level (e.g., E4). For each grade level, the Company assigns a salary range which is used to determine the employee's salary. Sun's Compensation unit assigns the appropriate grade level to each job company wide to ensure equal pay for equal work. Unlike a promotion, the issue is not whether an individual is worthy of a higher grade. Rather, the sole issue is whether the position (and not the individual incumbent) is assigned the correct level. Accordingly, in re-evaluating an existing job, Sun determines whether the functions of the job are the same or similar to other jobs at the same level. The individual qualifications of the incumbent in the job are irrelevant in performing such a compensation analysis.

Accordingly, Compensation Manager John Hytinnen reviewed the description of Herndon's job. On January 10, 1994, he concluded the job could not possibly warrant a higher grade than E4. Hytinnen saw no evidence the job required the application of principles, theories or concepts in order to warrant a higher level. He further concluded, compared to other level E4 jobs, Herndon's job was probably set too high.

Significantly, in reaching his conclusion, Hytinnen did not know Herndon much less her race. Herndon admitted she never met Hytinnen, never spoke to him, nor communicated with him by E-mail. She also admitted she has no idea whether Hytinnen discriminated against her.

5. **Herndon filed a charge of discrimination with the EEOC.**

On April 29, 1994, Herndon filed a charge of discrimination with the EEOC alleging that on January 22, 1994, Sun discriminated and retaliated by not re-leveling her job to a higher grade.

6. **Herndon did not perform higher-level duties warranting a promotion.**

On May 2, 1994, Rickert left and Tom Berghoff, the second-level manager, became the temporary, acting supervisor of Herndon's group. Herndon urged Berghoff to re-level her job upwards. She did not tell Berghoff that the Compensation unit had already evaluated her job. After finding out the position had just been reviewed, Berghoff told Herndon he would not explore this issue for at least a year. (Sun's practice is to conduct at most one re-leveling evaluation of a position per year.)

Herndon alleges from April 1994 to January 1995, she performed supervisory duties in Berghoff's absence. She also alleges she performed Marino's job duties for approximately 5 months during Marino's disability leave of absence. Sun asserts Herndon performed the duties of a non-supervisory lead. Because Berghoff's substantial travel obligations, he was not present to supervise on a day-to-day basis. He asked

Herndon, as the more senior, to take a lead role over Herndon's co-worker, Christina Atilano. Herndon distributed work assignments to Atilano, but she exercised no independent judgment of consequence. Also, while Marino was on leave, Herndon performed some but not many of Marino's functions. The bulk of Marino's duties were performed by her supervisor and a consultant Sandra Mende.

7. **Herndon was unqualified for a project coordinator job.**

In October 1994, Terry Bond allegedly invited Herndon to apply for an opening for E5 project coordinator. Herndon asserts Bond failed to interview her. Bond subsequently told her management wanted someone with experience working in Sun's education department, experience Herndon did not have. Herndon believes an individual named Frank was selected but she knows nothing about his qualifications.

***

On November 1, 1994, Herndon filed a complaint of discrimination with the federal Office of Federal Contract Compliance Programs. She alleged that Sun discriminated against her on account of race in failing to promote her.

8. **Herndon was assigned new duties as part of a department reorganization.**

On January 23, 1995, Sun hired Valerie Hirsch to supervise Plaintiff's group. Hirsch reported to Berghoff (now the second-level manager). She and Berghoff met to reorganize the group to improve productivity. For this effort, Hirsch asked

Herndon to describe her job tasks. This led to a protracted effort to obtain this information from Herndon.

Following their review of department functions, Berghoff and Hirsch decided to reorganize everyone's job duties (Hirsch, Herndon, Atilano and Marino). Herndon alleges the changes to her job were made in retaliation for her complaint of discrimination filed with the OFCCP. However, the decision to reorganize was made before the managers knew of Herndon's complaint. Berghoff and Hirsch completed and presented Herndon with her new job description on March 13, 1995. Sun was notified that Herndon had filed a complaint with the OFCCP on April 3, 1995. Sun first informed Berghoff and Hirsch of Herndon's complaint a month later, on April 13, 1995. Herndon admitted she kept the filing quiet because she did not want people to know. She did not tell Hirsch, Berghoff or any other manager about the filing.

Further, the changes to Herndon's job were not onerous, and everyone's job was changed. Hirsch took over Herndon's duty as liaison with the Information Resources department regarding the "bug" list (a list of software bugs). Herndon's data entry functions were reassigned to Atilano. At the same time, one of Marino's tasks, editing the Passport (SGS) database, was assigned to Herndon. Marino was reassigned to manage the Spectrum Pac project in the Worldwide Marketing Department, reporting directly to Berghoff.

Immediately, Herndon complained to HR saying this reassignment (without a promotion) was unfair because Marino, an E6, had previously performed the Passport editing function. On March 21, 1995, HR Manager Marian Davis explained to Herndon that the Passport function was appropriate for her E4 level, and the addition of this one task to

her duties did not warrant a grade change. Davis concluded the meeting by asking Herndon what she wanted HR to do for her. Herndon responded she did not want HR to do anything; she simply wanted to make her feelings known.

However, Herndon resisted carrying out her new duties. This led to another protracted effort by managers to convince Herndon to perform the duties. Finally, Berghoff wrote Herndon urging her to carry out her new responsibilities. Because they had discussed the matter a number of times, he considered the issue closed. In late May 1995, Herndon began working on the Passport database.

9. **Berghoff cooperated with the OFCCP investigation.**

Herndon argued that in retaliation for filing her complaint with the OFCCP and as part of his continuing discrimination against her, Berghoff tried to "get dirt on her." Rather, in about June 1995, OFCCP Compliance Officer Peggy Martinez investigated Herndon's complaint. As part of her investigation, she interviewed Berghoff about Herndon's performance deficiencies. During the interview, Berghoff mentioned he had received several complaints from employees about Herndon. Martinez requested Berghoff identify these individuals. Berghoff responded that these complaints were made in confidence and he needed to get the complainants' permission before disclosing their identity to the OFCCP. Martinez asked that Berghoff obtain their permission and written statements from these individuals. Accordingly, Berghoff contacted the employees and asked for their cooperation. Several agreed and provided written confirmation they had complained about Herndon's conduct.

10. **Herndon was unqualified for a marketing support job.**

On July 14, 1995, Herndon applied for an E6 Marketing Support Specialist position opening for which Berghoff was the hiring manager. Berghoff gave her an interview. Herndon asserted Berghoff, during the interview, added requirements that were not on the job posting. The addition of these requirements purportedly precluded her from qualifying. However the job posting, created before Berghoff had any inkling that Herndon would apply, stated the need for "strong written communication skills, project management and reporting experience." Herndon did not have these minimum qualifications. Berghoff subsequently selected Kellie Bishop for the job because she was the most qualified. Herndon admitted she does not know Bishop's qualifications.

11. **Herndon received an unsatisfactory performance rating.**

On about August 14, 1995, Herndon filed her lawsuit. She provided the Company with a copy of the lawsuit complaint on about September 19, 1995. Herndon asserts that she received a lower performance evaluation rating in retaliation for filing her lawsuit.

In August 1995, Berghoff and Hirsch prepared Herndon's annual performance evaluation. HR Manager Davis reviewed the document, conferred with Berghoff and Hirsch regarding its contents, and concurred with their assessment. In September 1995, Berghoff and Hirsch presented Herndon with her evaluation, rating her performance at an "M" level, meaning that: "Your performance fully meets some of the requirements of your position. However, a key area(s) of your job requires

improvement." Management pointed out several areas for improvement. Regarding Herndon's decision-making abilities they wrote: "Although Denise spends many hours researching problems, the time could be better spent in other ways. . . . Oftentimes, she fails to consult the technical manuals that clearly document how certain procedures are performed. . . ." Concerning Herndon's creativity, they wrote: "Denise often performs duties for years on end without questioning whether they are still valid. . . . A more appropriate approach would be to consistently look for opportunities to streamline and simplify rote tasks rather than to continue performing them endlessly without understand[ing] their need or importance."

12. **Herndon received a PIP and departed on a disability leave of absence.**

In November 1995, Berghoff and Hirsch consulted with HR Manager Davis in order to discuss Herndon's continued unsatisfactory performance and whether placing Herndon on PIP status was warranted. Davis reviewed the matter and advised that a PIP was appropriate. Accordingly, in December 1995, Berghoff and Hirsch placed Herndon on the PIP. The managers wrote that Herndon's job performance had not improved. Regarding her work on templates (i.e., forms) to be used in revising the Passport database, they wrote that her work was "rife with inaccuracies, misspellings, typographical errors and omissions." Accordingly, Herndon was placed on PIP status until February 1, 1996. Soon after receiving the PIP, Herndon left on a disability leave of absence and did not return.

REASONS FOR DENYING THE WRIT

1. The Court of Appeals Properly Concluded that Herndon Did Not Establish Pretext.

In a well-reasoned decision, the court of appeals thoughtfully addressed each of Herndon's claims and correctly ruled that she failed to raise a triable issue of fact that Sun's proferred legitimate business reasons were a pretext for discrimination.

A. Herndon did not establish pretext with respect to the denial of the E6 Marketing Support Specialist Position.

With respect to the E6 Marketing Specialist opening, Sun rebutted Herndon's prima facie showing by showing that she did not possess the strong written communication skills, and project managing or reporting experience required for the position. Herndon argued that the requirement of writing skills had been added after the job posting in order to justify rejecting her application. The court correctly observed, however, that the original job posting expressly stated that the position required "strong written communication skills." Plaintiff further merely asserted that she was qualified but did not offer any other evidence of her purported qualification.

Herndon argued that the court failed to give weight to prior performance evaluations that praised her communication skills. The court concluded that these evaluations did not establish that Herndon possessed the requisite "'strong writing skills, [and] project management or reporting experience' that Sun reasonably believed Herndon did not possess." (Petition, Exhibit A, page 5a.)

B. Herndon failed to rebut Sun's legitimate nondiscriminatory reasons for Marino's transfer.

Concerning Marino's transfer into Herndon's unit as an E6, Sun showed that Herndon was not considered because her supervisor, Rickert, believed Herndon could not perform the required duties. Herndon argued that this was pretext because she purportedly performed Marino's job while Marino was on disability leave. The court rejected this argument because the evidence showed that Herndon was merely assigned duties appropriate for her E4 level, and did not show that she ever "conducted meetings and out-of-country training, wrote processes and procedures, and coordinated work with external vendors" that were Marino's responsibilities. Further, the court rejected Herndon's submission of other employees' statements that Herndon was supposedly qualified to perform Marino's job functions because they were "generalized and conclusory statements." Further, these statements were inconclusive whether "any of the declarants knew the extent of Marino's job functions and whether Herndon had the ability to perform each of them." (Id.)

C. Herndon did not establish pretext concerning her releveling request.

Regarding Herndon's request to have her E4 position releveled to a higher grade, Sun established that the administrator who denied the request, John Hytinnen, did not know Herndon's race at the time of his evaluation, and accordingly, could not have intentionally discriminated against her based on race. Herndon did not dispute this fact but argued that Hytinnen's review was subjective and flawed. The court concluded, however, that whether the determinations are

subjective is immaterial in the absence of evidence that the "process was wrongfully manipulated in her specific case."

D. Herndon failed to rebut Sun's legitimate nondiscriminatory reason for denying her application for project coordinator position.

Concerning Sun's denial of Herndon's application for an E5 project coordinator job in another department, Sun showed that Herndon was rejected because the manager, Terry Bond, preferred to promote someone with experience from within the department. The court ruled that Herndon offered no evidence demonstrating that Sun's proffered reason was merely a pretext.

E. Sun properly reconfigured Herndon's job duties as part of a department reorganization.

Concerning Sun's decision to reconfigure Herndon's job duties, Defendant showed that it reorganized the department and assigned Herndon functions appropriate for her E4 classification. Sun also showed that the decision makers could not have intended to retaliate against Herndon because at the time of the reconfiguration they did not know that Herndon had filed discrimination claims. The court ruled that Herndon offered nothing to rebut Sun's showing and, accordingly, did not raise a triable issue of fact.

F. Herndon did not establish pretext with respect to her negative performance evaluation

Sun established that subsequently, Herndon received a negative performance evaluation because of consistent errors in her work. The court rejected the claim of discrimination because she failed to offer evidence to rebut Sun's proferred reason.

Regarding retaliation, Herndon asserted that her manager Berghoff talked to co-workers about her complaint, allegedly "looking for dirt" on Plaintiff to defeat her claims of discrimination. Berghoff denied making the "dirt" comment but admitted that he was tasked by the federal OFCCP investigator to contact Herndon's peers in order to document whether they had complaints about Plaintiff's work performance. He therefore requested several employees to furnish such statements. The court concluded Herndon failed to demonstrate retaliation because she did not offer evidence to rebut Sun's proffered reasons for the negative evaluation. (Id. at p. 7a.)

G. Herndon's other "evidence" of discrimination did not establish a triable issue of pretext.

Lastly, Herndon urged that the court should credit evidence of disparate treatment by other minority employees. This included statements by minority employees that they had not been promoted during the time that non-minority employees were promoted. Herndon also relied on a statement, purportedly made by Sun's CEO, that he resented the government telling him who he can and cannot hire, a report

that allegedly found disparity in the number of blacks employed in high executive positions at Sun, and a survey of women employees at Sun that supposedly concluded minority employees "have it worse."

The court rejected such evidence because Herndon did not establish that she was qualified for any of the positions cited, whether she or other minorities ever applied for the promotions, or even the identity of the decision makers. Such evidence did not involve any of the individuals who purportedly discriminated against Herndon.

Further, the court concluded that such evidence did not establish a hostile work environment under this Court's standard enunciated in *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21, 126 L.Ed.2d 295 (1993) (The workplace must be "permeated with discriminatory intimidation, ridicule, and insult ... that is sufficiently severe or pervasive to alter the conditions of [her] employment and create an abusive working environment."[1]

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[1] Similarly, the court ruled that Herndon failed to establish a disparate impact case. She failed to allege the existence of a facially neutral policy that in fact impacted more harshly on a protected group and that could not be justified by business necessity. *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609, 123 L.Ed.2d 338 (1993).

2. The Ninth Circuit's "Specific and Substantial" Evidence Standard To Establish Pretext Is Not in Conflict With Any Other Circuit and Is Consistent With This Court's Relevant Decisions.

Petitioner contends in her papers that the Ninth Circuit's application of the "specific and substantial" evidence standard to demonstrate pretext in the context of summary judgment in an employment case presents a "significant question of federal law." Yet, no argument presented by her to this Court demonstrates why this so-called significant question is worthy of the extraordinary relief she requests in the form of a writ of certiorari. Of the various criteria applied to determine whether a question merits review by this Court, only two bear any possible relevance to the instant petition: (1) a conflict by a U.S. Court of Appeal decision and that of another U.S. Court of Appeal on the same matter, [S.Ct. Rule 10(a)]; or (2) a decision by a U.S. Court of Appeal on a question of federal law that has not been, but should be resolved by this Court, [S.Ct. Rule 10(c)].[2] Nor should a petition issue where the error asserted by Petitioner consists of "erroneous factual findings" or the "misapplication of a properly stated rule of law." As discussed more fully below, Petitioner has not asserted any legal basis upon which the issuance of a writ would be appropriate in this case. Her petition should therefore be denied.

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[2] Petitioner contends that this Court has never addressed the applicable standard for establishing pretext in the context of summary judgment in an employment case. Consequently, she cannot seek issuance of a writ under Rule 10(c) on the grounds that the Ninth Circuit's ruling "conflicts with relevant decisions of this Court." S.Ct. Rule 10(c).

A. This Court Set The Standard Applied By The Ninth Circuit on Summary Judgment.

Petitioner's attempt to characterize the Ninth Circuit as a maverick in its development of the "specific and substantial evidence" standard lacks any basis in law and fact. In addressing the standard for summary judgment under Rule 56(e), this Court held in 1968 that a plaintiff opposing a summary judgment motion bore the burden to produce specific and significantly probative evidence of a factual dispute. First Nat'l Bank v. Cities Service Co., 391 U.S. 253, 288-90, 20 L.Ed.2d 569 (1968). In other words, Rule 56(e) requires that "sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." First Nat'l Bank, 391 U.S. at 289. Consequently, the plaintiff needs more than just some evidence, as Petitioner would contend, but evidence that has a specific bearing on the material fact at issue, i.e., which shows a "genuine issue for trial."

Borrowing directly from this holding, the Ninth Circuit applied this test in a sex discrimination action to require the plaintiff in opposition to a motion for summary judgment to advance specific facts rising to the level of "significantly probative" evidence, i.e., the type which would demonstrate a genuine issue for trial. Ruffin v. County of Los Angeles, 607 F.2d 1276, 1280 (9th Cir. 1979) (citing First Nat'l Bank, supra). Understandably, the application of this specific and significantly probative evidence standard requires that the evidence have significant probative force to counter the defendant's evidence of no discrimination. Over time, the Ninth Circuit has made a change in nomenclature to use

"significant probative force" interchangeably with "substantial evidence" without any change in the requirement that the evidence adduce sufficient evidencing force to counter the defendant's legitimate, nondiscriminatory basis for its actions. See Godwin v. Hunt Wesson, Inc., 150 F.3d 1217, 1222 (9th Cir. 1998) (applying "substantial evidence" test and citing case law requiring that evidence in opposition to summary judgment be "sufficiently probative."); see also Nidds v. Schindler Elevator Corp., 113 F.3d 912, 918-19 (9th Cir. 1997) (using the nomenclature "sufficiently probative" to require that the evidence be significant to rebut employer's proffered reasons). Such evidence may be either direct or circumstantial so long as it is "sufficiently probative" or "substantial." Godwin, 150 F.3d at 1222.

Indeed, Petitioner's application to this Court is further disingenuous in that it refers to a schism within the Ninth Circuit as to what standard should be applied but cites approvingly to two cases which apply the exact standard she now attacks. Wallis v. J.R. Simplot Co., 26 F.3d 885, 890 (9th Cir. 1994) (requiring "specific, substantial evidence of pretext.");[3] Washington v. Garrett, 10 F.3d 1421, 1433 (9th Cir.

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[3] Plaintiff's citation to Wallis for the proposition that summary judgment against an employee is only appropriate where there is no evidence at all to rebut the employer's legitimate explanation misstates the law. The holding of the Wallis case resulted from the plaintiff's actual lack of any evidence whatsoever to support his case in response to the employer's legitimate nondiscriminatory reasons. Wallis, 26 F.3d at 892. The plaintiff's failure in that case to adduce any evidence to rebut the defendant's legitimate explanation does not automatically result in the wholesale obviation of the requirement that a plaintiff produce specific evidence of

1993). These cases, she contends, impose a "sensibly [sic] burden" to produce evidence in opposition to a motion for summary judgment. Petition, at 19. Yet, that requirement is no different than it has ever been in this Circuit, i.e., to produce specific evidence which is sufficiently probative to establish pretext. Cf. Ruffin, 607 F.2d at 1280; Washington, 10 F.3d at 1434 (evidence of conflicting rationales for adverse action sufficient to establish pretext).

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sufficiently probative value to rebut a defendant's legitimate rationale for its actions.

B. The Ninth Circuit's Specific and Substantial Evidence Standard Does Not Conflict With The Standards Applied By Other Circuit Courts.

Petitioner's ability to support her petition to this Court based on Supreme Court Rule 10(a) fails in that no conflict exists between the summary judgment standards for pretext in the Ninth Circuit and its counterparts, in the employment context.[4] As discussed above, the Ninth Circuit employs a "specific and substantial evidence" test such that the evidence, whether circumstantial or direct, must be significantly or sufficiently probative of a material fact at issue. In the First Circuit, "[t]o prevail over a properly supported motion for summary judgment, a nonmoving party must establish the existence of a trialworthy issue by presenting 'enough competent evidence to enable a finding favorable to the nonmoving party.'" Dykes v. DePuy, Inc., 140 F.3d 31, 36 (1st Cir. 1998). Thus, summary judgment is not precluded by any factual quibble, but rather "substantial" evidence. Dykes, 140 F.3d at 36; see also Udo v. Tomes, 54 F.3d 9, 12 (1st Cir. 1995) (requiring "sufficient evidence" to demonstrate pretext). The Fifth Circuit employs a similar test requiring that the plaintiff produce a conflict in "substantial evidence to create a jury question." LaPierre v. Benson Nissan, Inc., 86 F.3d 444, 449 (5th Cir. 1996).

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[4] Respondent did not locate any case law applicable to this issue in the D.C. and Federal Circuits.

The remaining circuits each apply standards approximating those in the Ninth, First, and Fifth Circuits. See Grady v. Affiliated Central, Inc., 130 F.3d 553, 560 (2d Cir. 1997) (applying sufficient evidence standard); Iadimarco v. Runyon, 1999 U.S. App. Lexis 22029 (3d Cir. 1999) (evidence must be such that reasonable mind could find material issue of fact); Burns v. AAF-McQuay, Inc., 96 F.3d 728, 732 (4th Cir. 1996) (evidence of "sufficient probative force" required to overcome summary judgment); Woythal v. Tex-Tenn Corp., 112 F.3d 243, 246 (6th Cir. 1997) (sufficient evidence from which jury could conclude that employer's explanation should be rejected); Carter v. St. Louis Univ., 167 F.3d 398, 401 (8th Cir. 1999) (sufficient evidence standard); Tomsic v. State Farm Mut. Auto Ins. Co., 85 F.3d 1472, 1478 (10th Cir. 1996) (sufficient evidence standard); Mayfield v. Patterson Pump Co., 101 F.3d 1371, 1376 (11th Cir. 1996) (significantly probative standard).

Regardless of the semantics employed, the common denominator of these standards remains that the plaintiff needs more than just some evidence to prevail against a summary judgment motion. She must in fact raise sufficiently probative or significantly probative evidence to raise a genuine issue of material fact. The "substantial evidence" standard employed by the First, Fifth, and Ninth Circuits is no different. See LaPierre, 86 F.3d at 449 ("evidence is 'substantial' if it is 'such as to allow a rational factfinder to make a reasonable inference'" of pretext). Rule 10(a) does not support any basis for granting this petition for writ of certiorari.

C. This Circuit's Specific And Substantial Evidence Standard For Pretext Aligns With This Court's Construction of FRCP 56(e) And Does Not Present Any Issue For Further Resolution.

As discussed above, the Ninth Circuit's specific and substantial evidence test is derived in part directly from the Supreme Court's interpretation of FRCP 56(e). First Nat'l Bank, 391 U.S. at 289. It is therefore directly aligned with the standards articulated by this Court with respect to the sufficiency of the evidence which a plaintiff must adduce to successfully defeat a summary judgment motion. None of this Court's subsequent rulings regarding the plaintiff's burden to establish a triable issue of material fact alters this standard.[5] See e.g., Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 91 L.Ed.2d 202 (1986) (describing sufficiency of the evidence in "run of the mill" civil cases). The Ninth Circuit's ruling at issue in this case does not conflict with any prior ruling of this Court and Petitioner has failed to identify any specific or important question of law which requires this Court's further attention. See S. Ct. Rule 10(c).

* * *

Distilled to its essence, Petitioner's case does not present any legal issue worthy of the extraordinary relief she seeks from this Court. Rather, her petition for writ of certiorari seeks a second attack on the District Court's review of the

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[5] To the extent that Petitioner's claims that the courts should apply a "special" evidentiary approach toward discrimination cases, she fails to articulate any justifiable basis for this position.

insufficient evidence she presented in opposition to Respondent's motion for summary judgment. A petitioner's desire to dispute the lack of specific and substantive evidence to support her claims does not warrant the issuance of a writ of certiorari. S. Ct. Rule 10.

CONCLUSION

For the reasons stated, Respondent respectfully submits that the writ prayed for by Petitioner be denied.

Respectfully submitted,

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